Supreme Court, U.S.
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No. 97-1194

In The

Supreme Court of the United States

October Term, 1997

EASTERN KENTUCKY RESOURCES, *et al.*,

Petitioners,

vs.

THE FISCAL COURT OF MAGOFFIN COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE FISCAL COURT OF MAGOFFIN COUNTY

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QUESTION PRESENTED

Whether a state municipal solid waste program that links landfill permits to local planning violates the Commerce Clause, by allowing a county either to host a landfill with an evenhanded cap on the landfill's size, or to prohibit all new landfills and to market its garbage outside the county.

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Appendix A — Kentucky Revised Statutes 1a

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The Respondents, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky, and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky, and The Fiscal Court of Magoffin County, respectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the opinion issued by the United States Court of Appeals for the Sixth Circuit in this case. That opinion is reported at 127 F.3d 532 (1997).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are KRS 224.43-345, KRS 224.43-010, and KRS 224.40-315. They are presented in the appendix because of their length, and because EK Resources' quotations were not set forth verbatim in conformity with Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This is a case about EK Resources' attempt to site a new municipal solid waste landfill in Magoffin County, Kentucky. Because EK Resources did not succeed, it is petitioning the Supreme Court of the United States to do what the courts below would not - strike Kentucky's program for managing municipal solid waste down under the Commerce Clause. EK Resources did not prevail below because it failed to prove that discrimination by differential treatment existed under the challenged statutes, as is necessary for strict scrutiny under the Commerce Clause. EK Resources now asks the Supreme Court to overturn the findings of fact made by the United States District Court, Eastern District of Kentucky and affirmed by the United States Court of Appeals for the Sixth Circuit, to hold that differential treatment does in fact exist.

In so petitioning, EK Resources omits in its Statement of the Case several key factual findings entered by the courts below. These facts relate to the timing between the landfill proposal and the challenged statute's enactment, the reasons for Kentucky's actions with respect to the landfill permit application, and the events, unrelated to the challenged statute, that hindered construction of the new landfill.

Kentucky's program for managing municipal solid waste (commonly known as garbage) sets design and operation standards for landfills, and links landfill permits to local planning. Kentucky first developed a program regulating garbage disposal in the 1960's, but it emphasized the control of open dumps, with minimal local planning. The local planning that was required was not effective, and was not linked to the issuance of landfill permits. In 1990, Kentucky's Natural Resources and Environmental Protection Cabinet ("the cabinet") adopted more stringent standards for landfills, and then-Governor Wallace G. Wilkinson announced a special legislative session on garbage.

Senate Bill 2, Ky. Acts 1991, ch.12 ("SB 2") was enacted at the special legislative session, and became effective February 21, 1991. It contains sixty-three sections governing garbage reduction strategies, landfill permits, state and local planning, garbage collection, tax incentives for recycling, and public participation in local planning and permitting. Local planning areas were to be established, and were charged to administer fifteen solid waste planning duties, including the duty to project local garbage disposal needs and to plan for those needs by finding present and future "homes" for garbage. KRS 224.43-345.[1] The goal of SB 2 is to reduce the amount of

1. It has been well noted in the lower Federal Court opinions that Kentucky has made great progress in recycling. In 1990, prior (Cont'd)

garbage generated per person by 25%, by using the three basic precepts of solid waste management, "reduce, reuse, and recycle". KRS 224.43-010.

(Cont'd)
to Senate Bill 2, 104 of 120 counties reported that no recycling programs existed within the planning area; in 1993, well after the implementation of Senate Bill 2, the local garbage plans showed **that only 26 remaining counties of 120 counties do not have recycling programs.** Furthermore, to date, 97 of 120 counties have data on garbage collection rates, etc.... **with all** 120 counties having local citizen advisory committees.

Magoffin County has in one sense taken the lead in it's effort to reduce, reuse and recycle waste pursuant to KRS 224.43-345. In 1995, the newly instituted recycle center disposed of 141,000 pounds of "in-county waste" with minimal recycle material from "out-of-county". In 1996, 207,000 pounds of "in-county waste" was recycled plus 64,000 pounds of "out-of-county waste" recycled. Then, as of 1997 year end, a record 390,000 pounds of "in-county waste" was recycled plus 50,000 pounds of "out-of-county waste". These figures do not account at all for used appliances or larger materials that are taken to Magoffin County's transfer station. Primarily, the figures above account for paper, plastic, glass and other such similar household waste.

Magoffin County's recycle program, albiet it partially funded, is primarily comprised of civic minded citizen volunteers who tirelessly give up their free time. These citizens and Magoffin's recycle program as a whole have been recognized time and again as a leader in recycling by television, newspaper, the Kentucky Division of Waste Management and by Resolution of the Kentucky Senate. This program of recycling is not only unique for the reasons stated, but is also different because there are no consultants hired to write the solid waste plan for the County. Instead, this plan is written by a citizen comprised solid waste advisory board. Without this local citizen participation, this successful program of rural recycling would not have been possible.

Kentucky counties must either "host" a landfill open to local and out-of-county garbage (including out-of-state garbage), or they may "sell" their garbage outside the county, in which case new landfills are not sited within the county. A county hosting a new landfill may limit its capacity, but only by limiting the total amount of garbage to be accepted. A county may not site a local landfill and reserve its capacity for local use. SB 2, as drafted and administered, does not allow a ban on garbage from outside a county.[2]

SB 2 links landfill permits to local solid waste management plans, by requiring all applications for new landfills to be locally reviewed. KRS 224.40-315. This furthers the legitimate local interest of requiring government officials, local citizens and landfill developers to work together on reducing the amount of garbage generated per person and slowing the flow of garbage into landfills. *See, e.g.*, KRS 224.43-010(2), (3). This "local determination" process applies to all new landfills and substantial expansions of existing landfills.

Under SB 2 all garbage is treated identically, regardless of origin, and garbage moves freely into and out of Kentucky. The record below reflects that the amount of garbage imported to Kentucky from out-of-state has doubled since enactment of SB 2. At the same time, the number of landfills went from 70 to 30. Petitioner's Appendix, pages 25a, 40a ("Pet. 25a, 40a"). The total disposal capacity authorized in the 118 local solid waste plans is double Kentucky's needs as projected over the next ten years, meaning that half of authorized capacity is reserved for out-of-state garbage. *Id.* The Sixth Circuit held

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2. However, a county may own its own landfill and reserve that landfill for local use without violating the Commerce Clause, under the market participant doctrine established in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Two of Kentucky's 120 counties have selected this option.

that this is an evenhanded approach to managing garbage, presenting no differential treatment benefiting a local economic interest and burdening a foreign interest. (Pet. 26a-27a). In so holding, the Sixth Circuit affirmed the findings made by the district court. (Pet. 55a-56a).

EK Resources offers the conclusion in its Statement of the Case that Kentucky acted to stop the proposed landfill since the landfill would accept out-of-state garbage. The record does not support that conclusion. To begin with, SB 2 could not have been enacted to defeat EK Resources' landfill, because it was months after enactment of SB 2 that EK Resources first presented its landfill proposal to the Magoffin County Fiscal Court. (Pet. 44a). Further, the cabinet rejected EK Resources' permit application because the county's solid waste management plan, which incorporated the proposed landfill, was defective. (Pet. 44a-45a). That plan was defective because it allowed the county's old substandard landfill to operate illegally while EK Resources' landfill was being constructed. Indeed, the cabinet included EK Resources' proposed landfill in its own plan for Magoffin County, a plan required by SB 2 because the county failed to submit a timely, completed plan. (Pet. 45a-46a). A legal challenge to the contract for the proposed landfill entered between EK Resources and the Magoffin Fiscal Court hindered the county's timely completion of a plan. (Pet. 45a). The legal challenge, as well as changes in the membership of the fiscal court, led to a stalemate among those members and ultimately a county decision not to host a landfill at all. *Id.*

The landfill contract initially entered between EK Resources and the Magoffin County Fiscal Court in December 1991 was ultimately struck down by the Kentucky Supreme Court as violating the Kentucky Constitution, because of the county's failure to allow public notice and competitive bidding on the contract. *Eastern Kentucky Resources v. Arnett*, 934 S.W. 2d

270 (Ky. 1996). If the Kentucky Supreme Court had instead affirmed the contract, EK Resources would be proceeding to site the landfill as proposed. This demonstrates conclusively that SB 2 is not the source of EK Resources' difficulties. Indeed, EK Resources' failure to follow the Kentucky Constitution in contracting with the county, and its unsuccessful SLAPP suit against local citizens who challenged the contract, provide more than an adequate explanation for its landfill siting woes. *See, Eastern Kentucky Resources v. Arnett*, 892 S.W. 2d 617 (Ky. App. 1995).[3]

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3. The failure of the Fiscal Court of Magoffin to issue public notice or to follow certain basic competitive bidding practices in 1991 in regard to the corporation, EK Resources, was no oversight or mistake. At this time, the Magoffin County Fiscal Court was advised by then County Attorney John "Jack" Collins and his Assistant County Attorney Gregory D. Allen. Magoffin County Attorney Assistant Gregory D. Allen was the nephew of Charles Allen, who was Magoffin County Judge at the time. County Judge Charles Allen heavily courted EK Resources and their money. County Judge Allen met with them in private and was supported by real estate agent, Darvin Allen, father of Gregory D. Allen, in his efforts to bring out-of-state garbage into Magoffin County. Attorney Allen even prepared deeds of conveyance for EK Resources who purchased the land for the landfill in the small community of Half Mountain, Kentucky. Meanwhile, after a series of secret and private meetings were held by County Judge Charles Allen with various entities who promoted out-of-state garbage, these secret events were discovered by then Salyersville Independent reporter, Jerry Hardt. Once the story went to press, the public became outraged that all of this had been hidden from their view and the people exercised their freedom of speech and right to vote in simultaneous fashion. Some fiscal court members resigned. County Judge Allen died while in office. Then, at election time, the voters of Magoffin County did the rest by voting in new fiscal court members, County Judge, County Attorney, Circuit Clerk, District Judge, etc... Thus, through the will of the people, the solid waste plan of Magoffin **simply reflects the deisres of citizens of**

(Cont'd)

The Sixth Circuit reached a very different conclusion than the one EK Resources submits in its Statement of the Case. Of the events surrounding EK Resources and its efforts to site a new landfill in Magoffin County, the Sixth Circuit stated:

> When the Cabinet rejected the County's area plan and rewrote a plan for the County, the Cabinet itself suggested that the County use EKR's proposed landfill. However, the contract between EKR and the County was later declared invalid, the composition of the Fiscal Court changed, and the new members decided to do the expedient and not build a landfill at all in Magoffin County. These events were most likely the predominant, if not the only reasons, why EKR did not succeed.

(Pet. 25a). As the Sixth Circuit concluded in reviewing the facts EK Resources presented, "[t]he Commerce Clause is not a safety valve for those who are simply political process losers". (Pet. 24a).

(Cont'd)
Magoffin by preventing the location of any landfill in its borders for either local or out-of-state waste. This response and attitude of the citizens of Magoffin can be attributed to many factors, but of paramount concern is that Magoffin County houses the head waters of the Licking River that empties into the Ohio River. The head waters of the Licking River is where the first landfill was scheduled to be located (Half Mountain), receiving 10,000 tons of trash each day.

REASONS FOR DENYING THE WRIT

I.

THE CASE TURNED ON A QUESTION OF FACT, NOT CONSTITUTIONAL LAW; THE SIXTH CIRCUIT CORRECTLY APPLIED SUPREME COURT PRECEDENTS AND ISSUED AN OPINION CONSISTENT WITH THOSE PRECEDENTS AND THE OPINIONS OF OTHER CIRCUITS.

The Commerce Clause states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. 1, § 8, cl. 3. The Supreme Court has established a "dormant" component of the Commerce Clause, which limits a state's ability to pass laws that impermissibly interfere with the flow of interstate commerce. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). If state legislation discriminates against interstate commerce, it violates the dormant component of the Commerce Clause unless the state or local government shows the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 274 (1988). Discrimination is defined as differential treatment based on the origin of the article of commerce. *City of Philadelphia*, 437 U.S. at 627-28. However, statutes which regulate evenhandedly and have only indirect effects on commerce are upheld unless the burdens are "clearly excessive in relationship to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Garbage is an article of commerce protected by the Commerce Clause. *See City of Philadelphia*, 437 U.S. at 622.

However, garbage has no economic value; it only has value in the marketplace because of government regulations to ensure its proper disposal as a health and safety measure. Thus, unlike the classical "widgets," garbage has a public health and safety component requiring government intervention. That is the genesis of all solid waste management programs, from collection to disposal. There is a delicate balance between the police power, legitimately exercised to enforce proper management of garbage as a potential health hazard, and the marketplace that delivers this service. This is the reason for the series of waste management-related cases decided under the Commerce Clause since *City of Philadelphia.*

There are two categories of waste management-related regulation that constitute economic protectionism requiring strict scrutiny under the Commerce Clause. The first occurs when foreign waste is banned or restricted while local waste is not, or when a scarce local resource is hoarded for local use, such as when landfill space is reserved for local waste. *See, e.g., City of Philadelphia*, 437 U.S. at 624. The second occurs when a preferred local business is protected against foreign competition, such as when all local waste must be delivered to a local waste disposal facility. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). This is known as "flow control," and is essentially a local processing requirement. *Id.*

However, economic protectionism is not created by the evenhanded regulation of commerce. If a statute treats commerce evenhandedly, then the statute is entitled to review under the *Pike* balancing test. *Pike v. Bruce Church,* 397 U.S. at 142. One type of evenhanded treatment exists when the requirement simply excludes everyone from the marketplace. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978) (upholding a Maryland statute under the Commerce Clause that prohibited all petroleum producers and refiners from owning

retail stations); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota statute under the Commerce Clause that prohibited the sale of milk in plastic, non-returnable containers). Another type of evenhanded treatment exists when a local requirement is applied across the board to everyone participating in the marketplace. *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287 (3d Cir. 1992) (state recycling code for hazardous waste by products), *cert. denied*, 506 U.S. 1000 (1992); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (certificate of need for all solid waste transporters), *cert. denied*, 515 U.S. 1143 (1995); *Blue Circle Cement v. Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) (zoning ordinance applicable to all hazardous waste sites). Further, in waste management-related cases this Court has expressly noted that states may act to slow the flow of all waste or to place evenhanded caps on landfills. *City of Philadelphia*, 437 U.S. at 626; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 345 (1992). *Accord, Chambers Medical Technologies of S.C., Inc. v. Bryant*, 52 F.3d 1252 (4th Cir. 1995) (upholding a fluctuating cap on the total amount of infectious waste an incinerator may accept).

In challenging the constitutionality of a state statute, EK Resources bears a heavy burden. Statutes should be construed whenever possible so as to uphold their constitutionality. *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Those who would challenge bona fide state safety regulations using the Commerce Clause must overcome a strong presumption of validity. *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981). Thus, while EK Resources charges that the Sixth Circuit erred in applying the balancing test instead of the *per se* test, it fails to acknowledge the factual predicate for imposing strict scrutiny under the *per se* test: Discrimination, the differential treatment of an article of commerce based on its

origin, must exist. *Oregon Waste Systems v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994); *Pike v. Bruce Church*, 397 U.S. at 142; *City of Philadelphia*, 437 U.S. at 627-8. The burden is on the challenger to demonstrate the existence of differential treatment. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). It is this evidentiary burden that EK Resources did not carry.

Thus, EK Resources is in reality asking for the Supreme Court to issue a writ of *certiorari* to the Sixth Circuit for the purpose of overturning allegedly erroneous findings of fact, and not for any compelling reason. Further, the Sixth Circuit affirmed the findings of fact made by the district court. This Court need not review those concurrent findings of fact, since no "extraordinary reason for undertaking this task" exists. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). For that reason, the petition should be denied.

A. EK Resources Did Not Prove That Senate Bill 2 Was Enacted With a Discriminatory Purpose.

EK Resources asks the Supreme Court to hold that SB 2 has a discriminatory purpose, yet it offers no direct evidence of a discriminatory purpose. Moreover, in its discussion of discriminatory purpose, EK Resources offers no legal authority explaining how the Sixth Circuit either misapplied Supreme Court precedent or contradicted opinions issued by other circuits. Further, EK Resources ignores the opinions issued by the Second and Eighth Circuits in reviewing solid waste-related statutes for a discriminatory purpose.

In framing this argument, EK Resources equates purpose to motive. It is questionable whether motive can be so equated, since without other evidence of discrimination, evidence of motive is of limited probative value. *See, e.g., Hunt v.*

Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977); *Gary D. Peake Excavating, Inc. v. Town Bd. of Hancock,* 93 F.3d 68, 74 (2d Cir. 1996). Indeed, as the Sixth Circuit noted, articulated legislative objectives are the actual purposes of a statute, and those words are often sufficient in and of themselves to determine those purposes, citing *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Clover Leaf Creamery Co.*, 449 U.S. at 463, 471 & nn.7, 15. (Pet. 19a). Thus, KRS 224.43-010, stating the purpose of SB 2, is adequate evidence to establish legislative purpose. Yet the Sixth Circuit did review the additional evidence EK Resources presented, and concluded, as did the district court, it did not support the premise that SB 2 was enacted with "bad motive". (Pet. 20a-22a, 53a-55a).

EK Resources tenders as proof that SB 2 was enacted with a discriminatory purpose a 1990 University of Kentucky study commissioned by then-Governor Wallace Wilkinson. This study could not have been "a blueprint" for Kentucky to discriminate against out-of-state garbage, since there is no evidence in the record that then-Governor Wilkinson had any influence over the contents of the study, that the study influenced the vote of any legislator in enacting SB 2, or even that then-Governor Wilkinson appointed the University of Kentucky's president. (Pet. 21a). EK Resources attempts to bolster the evidence presented below by making these unsupported statements. Such statements not supported by the record should be disregarded. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970).

The study was hardly a blueprint for discrimination, even if it had been relied upon. Instead it examined many solid waste management issues, such as those related to open dumping, garbage collection, recycling, landfill design and capacity, local planning, and public participation. It does not focus on public opposition to out-of-state garbage, and where the issue is

examined, the study cautions that there is a duty to comply with the Commerce Clause and the judicial precedents interpreting it. (Pet. 53a).

Similarly irrelevant are the opinions of the later-elected governor, Brereton Jones, and later-elected county judge-executive, Charles Hardin, since there is no evidence in the record that their opinions influenced the actions of the Kentucky legislature in enacting SB 2, or the actions of the cabinet in administering it. (Pet. 54a). In an attempt to correct this deficiency in the evidence, EK Resources proffers as evidence a footnote in a law review article, in which the author claims familiarity with the enactment of SB 2, and asserts that the working premise of that legislative session was that local landfills could preserve local landfill space for local use through capacity assurance. The author was not a legislator, and even if he were, in construing Kentucky statutes the courts do not inquire into the motives that impel legislative action either before or after such action is taken. *Morrow v. City of Louisville*, 249 S.W. 721, 724 (Ky. 1952). Further, since under SB 2 Kentucky counties are not allowed to reserve local landfill space for local use, the author's assertion is simply erroneous.[4]

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4. Magoffin County Attorney, William Grover Arnett, never directly influenced the passage of SB2. Instead, he was elected by the citizens of Magoffin County, as were many other public officials, to insure that the Magoffin County Solid Waste Plan reflected the interest of the majority. The majority of the people opposed a solid waste plan for Magoffin County that includes establishing a landfill for in-state or out-of-state waste. Many reasons for opposition to any landfill has been voiced, but a fact that can not be overlooked is that EK Resources and the old pro-landfill fiscal court had negotiated the terms of this landfill in secret, purposely hiding it from the public. The result was a galvanized public who stood fast together against at least one clear opponent — a bad government who obviously had a secret deal to hide. Thus, it is clear from the evidence

(Cont'd)

The evidentiary weaknesses are best illustrated by EK Resources' failure to present the "bad motive" case it relied on below, *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995). In *SDDS*, the Eighth Circuit invalidated a South Dakota statute requiring a referendum on environmental issues before any large landfill could be constructed, even though environmental reviews for such landfills were already conducted by the state environmental protection agency. Key to the Eighth Circuit's decision was direct evidence that the statute was enacted with the purpose of stopping a large landfill that proposed to accept out-of-state garbage. By contrast, the Sixth Circuit found no direct evidence to suggest that SB 2 was enacted to stop EK Resources' landfill (or any other any landfill) because it would accept out-of-state garbage, noting that:

> Unfortunately, EKR does not present my such evidence to support its contention that KRS 224.40-315 and KRS 224.43-345 were enacted by the Commonwealth with the purpose of protecting local economic actors from interstate competition. . . . When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute. (Pet. 21a).

See Washington State Apple Advertising Comm'n, 432 U.S. at 351-53; *Peake Excavating, Inc.*, 93 F.3d at 74.

(Cont'd)
that EK Resources' rights under the Commerce Clause have not been violated, rather they have been discarded along with the rest of the garbage by a public who reacted to the wrong doing of both EK Resources and an earlier Magoffin County Fiscal Court, then County Judge Charles Allen and then County Attorney John "Jack" Collins. Local economic actors versus interstate competition was simply never part of the issue in regard to the people or SB2.

EK Resources bore the burden of demonstrating that SB 2 has a discriminatory purpose, and as the Sixth Circuit correctly held, EK Resources failed to present the evidence necessary to carry that burden. *See Hughes v. Oklahoma*, 441 U.S. at 336. (Pet. 20a, 22a). The motive and argument EK Resources advances in its petition is nothing more than a plea for the Supreme Court to re-examine the evidence presented below, Such a re-examination is not worthy of a writ of certiorari.

B. EK Resources Did Not Prove That Senate Bill 2 Discriminates in Practical Effect.

EK Resources asks the Supreme Court to hold that SB 2 discriminates in practical effect. While EK Resources seeks to persuade that the Sixth Circuit ignored Supreme Court precedents and created a new rule contradicting those precedents, in reality the Sixth Circuit simply applied those precedents to the facts. In its petition EK Resources attempts to manufacture a legal issue out of an issue of fact, after it failed to place the necessary facts into evidence.

EK Resources argues that the 118 area solid waste management plans demonstrate that SB 2 discriminates in practical effect, stating that 85 of those 118 plans "provide no capacity whatsoever for out-of-area (and thus out-of-state) waste." (Pet. 11). What EK Resources does not state is that those same counties also do not have capacity for local garbage. They do not have capacity for anyone because they do not host a new landfill and they market their garbage elsewhere. After examining all of the 118 plans, both the Sixth Circuit and the district court found no discrimination because the amount of out-of-state garbage imported to Kentucky doubled after enactment of SB 2, despite the fact that the number of Kentucky landfills decreased. (Pet. 25a, 51a). The Sixth Circuit also found persuasive the fact that landfill capacity is double Kentucky's

projected needs over the next decade, meaning half of that capacity is reserved for out-of-state garbage. (Pet. 25a).

EK Resources cites *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Brimmer v. Rebman*, 138 U.S. 78 (1891); and *GSW v. Long County*, 999 F.2d 1508 (11th Cir. 1993), in support of its argument that SB 2 discriminates against interstate commerce because even though in-state economic interests are burdened, out-of-state economic interests are also burdened. However, the cases cited are local barrier cases. In each, a local product (milk in *Dean Milk*, meat in *Brimmer*, garbage in *GSW*) was favored over foreign products, and each local requirement, while it may not have discriminated at the state line, did discriminate at the county line or at some other line dividing local from foreign interests. By contrast, under the Kentucky statutes there is no barrier dividing a local interest from a foreign interest, because there is no local landfill. Either a local planning area hosts a landfill within its borders and sets an evenhanded, origin-neutral cap, or it does not host a landfill and the local garbage is marketed elsewhere. Governments have the ability simply to eliminate a market by virtue of legislation, as long as it is evenhanded and local producers are not favored. *See, e.g., Exxon*, 437 U.S. at 127-28; *Clover Leaf Creamery*, 449 U.S. at 474; *U.S.A. Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) (town's decision to eliminate commercial garbage collection service and to take over that responsibility is evenhanded and not discriminatory), *cert. denied*, __ U.S. __, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996).

Hence, EK Resources must overcome the fact that in Kentucky all economic interests, whether local or foreign, are equally burdened. EK Resources attempts to do so by relying on *GSW* for the principle that a county violates the Commerce Clause if it prohibits new landfills and instead markets its garbage elsewhere. This reliance is misplaced, because *GSW* is simply a

local barrier case, involving a contract between a county and a private company to construct a landfill, where the county attempted to renegotiate the contract after its execution to add a 150-mile geographical limit on garbage disposed at the landfill. The Eleventh Circuit applied the strict scrutiny of *City of Philadelphia*, 437 U.S. at 624, and said there was no basis for Imposing this new term except for the origin of the waste. The Eleventh Circuit expressly recognized that the contract could have eliminated all competition, stating:

> Long County could have decided not to contract for waste disposal services and not to license a potential provider of such services without violating the Commerce Clause; but once it decided to contract for services and then to place a restriction, it cannot escape constitutional scrutiny, 999 F.3d at 1518.[5]

While *GSW* examines the Commerce Clause in the context of state contracts, it is inapposite because Magoffin County did not site a local landfill with a geographic limit for the garbage it could take. *GSW* does not stand for the proposition that a decision to use a contract to eliminate all competition violates the Commerce Clause.

Further, EK Resources is not challenging its contract with Magoffin County in the case *sub judice*. In fact EK Resources sought in the state court action to hold the county to the terms of that contract. *Eastern Kentucky Resources v. Arnett*, 934 S.W. 2d 270 (Ky. 1996). Any Commerce Clause issues presented by that contract were not before the courts below, and are therefore

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5. *But see SSC Corp. v. Town of Smithtown*, (2d Cir. 1995) 66 F.3d 502, 515-519 (town is a market participant exempted from confines of Commerce Clause in contracting for its waste collection and disposal), *cert. denied*, __ U.S. __, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996).

not before the Supreme Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992); Supreme Court Rule 14.1(a). While EK Resources argues that the contracts entered between other Kentucky counties hosting landfills and landfill operators are evidence of discrimination, the relationship between those contracts and the evenhanded caps on landfill size set by those counties is also not before this Court. *Id.*[6]

2. *But see SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 515-519 (2d Cir. 1995) (town is a market participant exempted from confines of Commerce Clause in contracting for its waste collection and disposal), *cert. denied*, __ U.S. __, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996).

3. The district court reviewed the contracts placed into the record. It concluded that any burden they might impose was negated by the undisputed evidence of Kentucky's evenhanded treatment of garbage, and that the contracts were freely negotiated in the marketplace without the cabinet's regulatory oversight. (Pet. 51a-52a).

The decision not to host a landfill is simply a decision to eliminate all competition, since no local competitors or products are preferred. The Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127-28. In authorizing that decision, SB 2 regulates evenhandedly and the Sixth Circuit correctly reviewed it by using the *Pike* balancing test. *See Clover Leaf Creamery*, 449 U.S. at 472; *Town of*

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6. The district court reviewed the contracts placed into the record. It concluded that any burden they might impose was negated by the undisputed evidence of Kentucky's evenhanded treatment of garbage, and that the contracts were freely negotiated in the marketplace without the cabinet's regulatory oversight. (Pet. 51a-52a).

Babylon, 66 F.3d at 1286-88. The Commerce Clause does not mandate that each county construct a landfill. As the Sixth Circuit held, "we emphatically reject that argument". (Pet. 24a).

C. Because EK Resources Did Not Prove That Senate Bill 2 Has Discriminated Against Interstate Commerce, This Case Is Distinguishable From *Fort Gratiot* and *GSW*.

EK Resources asks the Supreme Court to hold that the Sixth Circuit has issued an opinion that conflicts with the Eleventh Circuit's opinion in *GSW*, *supra*, and abrogates the precedent set by the Supreme Court in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). Since those cases presented situations where local regulation erected a barrier, either at the county line or at a set distance, this case is distinguishable on its facts, as the Sixth Circuit correctly concluded.

Kentucky's program does condition landfill permits on their relationship to local solid waste management plans. KRS 224.40-315, KRS 224.43-345. In that respect, Kentucky's program is similar to the Michigan solid waste management program struck down by the Supreme Court as violating the Commerce Clause in *Fort Gratiot*. However, the Kentucky and Michigan programs contain a critical difference. In Michigan, a county could exclude foreign garbage from a local landfill by using a local solid waste management plan. In contrast, Kentucky requires local and foreign garbage to be treated identically. A county must either host a landfill, in which case garbage must be accepted regardless of origin (with an evenhanded cap on capacity), or the county does not host a landfill for anyone, including itself. KRS 224.43-345(1)(*l*), (m). The Sixth Circuit compared the Kentucky and Michigan programs and held that while the Kentucky statute may distinguish between in-area and out-of-area garbage, it is not a

discriminatory distinction because discrimination is the different treatment of local and foreign economic interests that benefit the former and burden the latter. (Pet. 18a).

Because EK Resources did not carry its burden of proving the existence of discrimination, the Sixth Circuit correctly applied the *Pike* balancing test. 397 U.S. at 142. Using the *Pike* test, the Sixth Circuit correctly held that Kentucky carried its burden to establish that SB 2 furthers legitimate local goals, including the goal of reducing the amount of garbage generated per person and thereby slowing the flow of all garbage into landfills. *See Fort Gratiot*, 504 U.S. at 367; *City of Philadelphia*, 437 U.S. at 626.

Indeed, the Sixth Circuit had difficulty finding even an incidental burden an interstate commerce, stating:

> From the facts presented in this ease, it is not clear if the challenged provisions place any incidental burdens on interstate commerce. As noted *supra*, both the County and the Cabinet proposed to use the services of a landfill developer — e.g., EK — which clearly stated, *ex ante*, that it planned to accept out-of-state waste at its proposed landfill. The Cabinet did not appear to believe that the challenged provisions prohibited the acceptance of out-of-state waste into the Commonwealth. There is no evidence in the record that the Cabinet objected to the fact that EKR planned to accept out-of-state waste. EKR does not state what, if any, incidental burdens the Commonwealth's waste disposal program places on interstate commerce. Consequently, based upon the record before us, we find that the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce. (Pet. 27a).

EK Resources is really asking this Court to convert the Commerce Clause from a shield protecting interstate commerce to a sword mandating state and local governments to open a local market that would otherwise be closed to all. Yet the decision to allow counties to eliminate all competition is evenhanded in its administration and benefits no local competitor while burdening others. *See Exxon*, 437 U.S. at 127-8; *Clover Leaf Creamery*, 449 U.S. at 472. Hence, the decision is reviewed under the *Pike*, *supra*, balancing test, as the Sixth Circuit correctly concluded. *See Town of Babylon*, 66 F.3d at 1286-88.

CONCLUSION

Kentucky's municipal solid waste management program does not benefit local garbage by burdening foreign garbage, or protect a local landfill operator against competition from foreign landfill operators. It does not preserve landfill space for local use, require local processing, or erect a geographic barrier. The undisputed evidence is that garbage is moving freely into and out of Kentucky, while the Kentucky program is accomplishing the legitimate local goal of reducing garbage generated per person and slowing Kentucky's reliance on landfills. EK Resources has not succeeded in siting a new landfill in Magoffin County, but neither has anyone else. This does not render constitutionally infirm a statewide program that treats all garbage identically, regardless of origin. The Commerce Clause does not prevent a state solid waste management program from eliminating a local market in its entirety. This is because the Commerce Clause, and for that matter the Constitution of the United States, embraces the democratic principals of popular sovereignty, *i.e.* the right of the people to rule, balanced with the demand that the law must be fairly and equally imposed. Such has been the ruling of the lower Federal Sixth Circuit and her District Court and such has been the case in Magoffin County. With a voice that is crystal clear, the people through their local elected officials have declared that they do not want any landfill placed in Magoffin County. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — KENTUCKY REVISED STATUTES

224.43-345 CONTENTS OF AREA SOLID WASTE MANAGEMENT PLAN - APPROVAL BY CABINET

(1) Each area solid waste management plan shall be prepared in accordance with administrative regulations to be adopted by the cabinet and shall be required to include the following:

(a) Identification of the area that will be included in the plan;

(b) A demographic study of the planning area of current and projected populations five (5), ten (10) and twenty (20) years in the future. A projection of the amount and source of solid waste generated and requiring disposal at municipal solid waste disposal facilities for each of these time periods shall be provided;

(c) An inventory and description of all existing solid waste management facilities and activities. The description shall include their identity, location, life expectancies, ownership, cost to the users, and level of compliance with state and federal laws. The description is not required to include any solid waste management facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator for the purpose of accepting solid waste from the solid waste generator or waste generated at another facility owned and operated by the generator or wholly-owned subsidiary. After commencement of operation by a solid waste generator of a solid waste disposal facility which is permitted but not included in a solid waste management plan, an amendment to a solid waste management plan shall be required for any solid waste which is to be no longer disposed by the solid waste generator in its own solid waste disposal facility;

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(d) An estimate of the area's long-range needs for solid waste management and facilities for five (5), ten (10), and twenty (20) years into the future;

(e) Identification and assessment of current and future solid waste management problems faced by the area. List any deficiencies with existing solid waste management facilities in meeting current and future area needs, and identify opportunities for improvement;

(f) Outline short-term, mid-term, and long-term goals and objectives of the solid waste management area. The goals and objectives shall be consistent with state policies.

(g) Based on the problems, needs, goals, and objectives previously identified, identify alternative approaches to solid waste management and select the optimal alternatives. Solid waste management activities and facilities to be addressed include:

1. Identification of those regulations and ordinances which provide for proper, safe, and sanitary management of solid waste;

2. A description of proposed improvements to existing solid waste collection and transportation systems;

3. Establishment of a sitting procedure and development program to assure the orderly location, development, and financing of new or expanded municipal solid waste management facilities. The plan shall demonstrate how all persons in the planning area will within the near future have reasonable opportunity to dispose of their waste in a manner that complies with state and federal laws;

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4. Identification of planned programs for the control and cleanup of litter and open dumps. The programs shall include: a schedule for the cleanup of illegal open dump sites which will result in the cleanup of those sites within one (1) year of cabinet approval of the plan; an annual survey of the county to discover new sites which shall then be scheduled for cleanup within one (1) year; and measures to prevent the recurrence of dumping at sites which are cleaned up;

5. An assessment of opportunities to reduce the need for land disposal by banning grass clippings, leaves, and other yard wastes from municipal solid waste disposal facilities and the institution of composting operations for grass clippings, leaves, and other yard wastes;

6. Establishment of a plan to reduce the need for land disposal through waste reduction and recycling, materials recovery, and energy recovery and the provision of opportunities for recycling that may include, but are not limited to, drop-off centers or door-to-door collection. Where recycling or material recovery is not deemed feasible, specific factual analysis shall be provided to support the conclusion; and

7. A description of any proposed recycling, materials recovery, or energy recovery plan or facility;

(h) A five (5) year schedule and description of activities to be undertaken to implement the proposed plan;

(i) A description of short-term costs of the plan including capital and operational costs on a per ton and per capita basis for each element of the plan, and the identification of the means of financing plan implementation;

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(j) Designation of the governing body for implementation of the solid waste management plan or components of the plan. A description of its responsibilities and authority shall be provided;

(k) A description of proposed surveillance and enforcement procedures to assure that solid waste in the planning area is properly managed. Identification of modifications to local laws and regulations necessary to implement the area plan;

(l) Specific previsions to assure that adequate capacity for a ten (10) year period shall be available for municipal solid waste generated in the solid waste management area, and identification of any additional capacity authorized for disposal of out-of-area municipal solid waste;

(m) Contractual agreements for use of waste disposal capacity at any municipal solid waste disposal facility inside or outside the waste management area identified and relied upon in the plan;

(n) Provisions to assure achievement of reductions in municipal solid waste requiring disposal, consistent with the goals of KRS 224.43-010;

(o) Establishment of a public information and participation process including the following components;

1. Formation of an advisory committee comprised of local residents, and business and industry representatives;

2. Preparation of a draft plan for public notice and comment;

3. Convening of a public hearing upon request; and

4. Publication of a response to public comments.

(2) The solid waste management plan shall consist of two (2) parts. The first part shall contain the information described in subsection (1)(a) through (1)(d) and (1)(l) of this section and shall be submitted to the cabinet by October 1, 1991. The second part shall contain the information described in subsection 1(a) through 1(o) of this section and shall be submitted to the cabinet by January 1, 1993. The cabinet shall approve or disapprove the first part of the plan within thirty (30) days of receipt, and the second part of the plan within one hundred twenty (120) days of receipt.

223.43-010 POLICY AND PURPOSE — PRIORITIES FOR SOLID WASTE MANAGEMENT PRACTICES — MUNICIPAL SOLID WASTE DISPOSAL REDUCTION GOAL

(1) It is hereby declared to be the policy of this Commonwealth and the purpose of this chapter to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.

(2) It is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management.

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(3) It is the policy of the Commonwealth that a comprehensive and integrated waste management system to handle solid waste is to be fostered. State policies and funding assistance shall reflect a preference for solid waste management practices according to the following priority:

(a) Reduction in the amount of waste generated;

(b) Reuse of solid waste;

(c) Waste recycling or yard waste composting;

(d) Resource recovery through mixed municipal solid waste composting or incineration;

(e) Land disposal in publicly-owned landfills or incineration of solid waste without energy recovery; and

(f) Land disposal in landfills other than publicly-owned landfills.

(4) It is further the goal of this Commonwealth that the amount by weight of municipal solid waste disposed at municipal solid waste disposal facilities shall be reduced by a minimum of twenty-five percent (25%) by July 1, 1997, as compared to fiscal year 1993 on a statewide per capita basis. However, credit shall be given for reductions achieved prior to 1993 when accurate measurements are available. The reduction goal shall not apply to special wastes as designated by KRS 224.50-760 or industrial solid waste.

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224.40-315 REQUIREMENTS FOR ACCEPTANCE AND APPROVAL OF PERMITS TO CONSTRUCT OR EXPAND MUNICIPAL SOLID WASTE DISPOSAL FACILITY

(1) No permit to construct or expand a municipal solid waste disposal facility shall be accepted for processing by the cabinet unless the application contains a determination from the governing body for the solid waste management area in which the facility is or will be located concerning the consistency of the application with the area solid waste management plan submitted under KRS 224.43-354(1)(a) to (d) and (1) until January 1, 1993, and the entire plan after January 1, 1993. The governing body for the area shall, within sixty (60) days of receipt of a written request, make the determination after public notice and opportunity for public comment and public hearing. For applications with a notice of intent filed prior to February 26, 1991, the cabinet shall continue to process the application but no permit shall be approved until the governing body for the solid waste management area in which the facility is or will be located has made a determination in accordance with this section.

(2) No permit to construct or expand a municipal solid waste disposal facility shall be approved unless the applicant affirmatively demonstrates and the cabinet makes a written finding in the preliminary determination made pursuant to KRS 224.40.310(2) that the application conforms to and is consistent with all of the following:

(a) The capacity needs identified in the area solid waste management plan;

(b) Other elements of the area solid waste management plan, for permit applications filed after approval of those elements;

(c) The statewide solid waste reduction and management plan, for permit applications filed after completion of the plan; and

(d) Applicable zoning regulations adopted pursuant to KRS Chapter 100.

(3) If the cabinet approves a permit to construct or expand a municipal solid waste management facility after the governing body for the area has determined the application to be inconsistent with the area solid waste management plan, as part of the written finding the cabinet shall state in detail the reasons why it did not accept the determination of the governing body for the area.

(4) For the purposes of this section, the term municipal solid waste disposal facility includes, in addition to those facilities defined in KRS 224.01-010(15), any residual or contained landfill or incinerator disposing of industrial solid waste for a fee, but does not include a waste site or facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator which accepts only industrial solid waste from the solid waste generator or industrial solid waste generated at another facility owned and operated by the generator or wholly-owned subsidiary.